

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARK RIFFEL,

No. 24239-1-III

Appellant,

v.

Division Three

**DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,**

Respondent.

UNPUBLISHED OPINION

SCHULTHEIS, J. — In March 2003, the Department of Social and Health Services (DSHS) adopted a computer software program that assesses a client's needs for in-home care by evaluating data related to the client's ability to perform certain tasks of daily living. This program, called the comprehensive assessment reporting evaluation (CARE) tool, is utilized annually to determine a client's eligibility for funds under the community options program entry system (COPES). Former WAC 388-72A-0005 (2003); former WAC 388-72A-0030 (2003); former WAC 388-72A-0055 (2003).

Mark Riffel, who had been receiving COPES funds for in-home care for several

years, was determined ineligible for COPES benefits after a CARE assessment in December 2003. The DSHS board of appeals affirmed this decision, as did the Spokane County Superior Court on his petition for review.

On appeal to this court, Mr. Riffel contends he qualifies for COPES benefits when his cognitive impairments are properly considered. He also assigns error to the failure to admit a diagnostic report prepared by a clinical psychologist. Finally, he argues that DSHS was precluded from changing his eligibility by principles of equitable estoppel. Because we find that Mr. Riffel fails to show error in the termination of his benefits, that the diagnostic report offered no new relevant evidence, and that the facts do not support a claim of equitable estoppel, we affirm.

Facts

Mr. Riffel is a developmentally disabled man who has lived with adult care worker Dawn Brown since 1998. While living with Ms. Brown, Mr. Riffel received COPES benefits for approved in-home personal care services.¹ Assessment records from 2000 and 2002 indicate that Mr. Riffel had impaired hearing in one ear; had memory problems; needed minimal care with personal hygiene and dressing; needed reminders for bathing; and could not shop, cook meals, or wash clothes. He was also determined to have

¹ “COPES is a federally funded program designed to provide the means for disabled persons to live in an independent situation.” *Caulfield v. Kitsap County*, 108 Wn. App. 242, 246, 29 P.3d 738 (2001).

impaired judgment due to his developmental disorder.

In December 2003, when Mr. Riffel was 39 years old, he was assessed using the new CARE program criteria. His case manager, Jennifer Iwanow, met with him and Ms. Brown, asked them the CARE assessment questions, and entered the data into the CARE assessment program. The questions concerned Mr. Riffel's ability to independently perform certain tasks of daily living. *See* former WAC 388-71-0203 (2003). According to information provided by Mr. Riffel and Ms. Brown, he was "independent with respect to bed mobility, transfers [getting in and out of bed, toilet, and bathtub (former WAC 388-71-0202)(15) (2003)], toilet use, dressing, locomotion in room, locomotion outside the room, and walking in the room." Board Record (BR) at 3, 18. On the other hand, Mr. Riffel needed supervision with personal hygiene, bathing, and eating. With this input, the CARE program determined that he was no longer functionally eligible for the COPES benefits.

In mid-January 2004, DSHS mailed Mr. Riffel notice that he would be terminated from the COPES program effective January 31. He requested an administrative hearing. After determining that Ms. Iwanow entered the information she received from Mr. Riffel and Ms. Brown correctly into the CARE computer program, and after noting that there was no evidence of software malfunction, the administrative law judge concluded that Mr. Riffel's unmet needs did not render him eligible for the COPES program. This initial

order was filed in August 2004. Mr. Riffel's appeal for review by the DSHS board of appeals included a request to allow submission of an additional evaluation by clinical psychologist Paul Domitor that had not yet been received. The board denied admission of this additional evaluation, finding that it was not newly discovered and was not necessary to resolve the dispute. Ultimately, the board concluded that the CARE assessment correctly evaluated Mr. Riffel's need for COPES services, and affirmed on October 25, 2004.

Mr. Riffel filed a petition for review with the superior court in November 2004. Noting that DSHS never disputed that Mr. Riffel was cognitively impaired, and that the undisputed findings of fact supported the agency's decision, the superior court affirmed in an order filed May 18, 2005. This appeal timely followed.

COPES Eligibility

Mr. Riffel first challenges DSHS's determination that he did not meet the criteria for COPES eligibility. He assigns error to the agency's conclusion that he did not suffer from a cognitive disorder plus an unmet need as defined by former WAC 388-72A-0055(4)(d).

Our review of the agency order in adjudicative proceedings is pursuant to RCW 34.05.570(3), which provides in part that we must grant relief if the agency has erroneously interpreted or applied the law, or if the order is unconstitutional, is outside

the statutory authority of the agency, is not supported by substantial evidence, or is arbitrary or capricious. Mr. Riffel contends the decision to rescind his COPES benefits was not supported by substantial evidence and was arbitrary or capricious.

“The burden of demonstrating the invalidity of agency action is on the party asserting invalidity.” RCW 34.05.570(1)(a). This court’s review of the facts is confined to the record before the administrative law judge and board. RCW 34.05.558; *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004).

When a party asserts that an agency action is not supported by substantial evidence, we examine the record to determine whether there is sufficient evidence to persuade a fair-minded person of the correctness of the order. *Id.* at 588. We do not weigh the credibility of the witnesses or substitute our judgment for the agency’s findings of fact. *Id.* Application of the law to these facts is a question of law subject to de novo review. *Id.* If the agency’s decision is determined to be willful, unreasoning, and taken without regard to the facts or circumstances, it may be overturned as arbitrary and capricious. *Id.* at 589. However, if “there is room for two opinions, and the agency acted honestly and upon due consideration, this court should not find that an action was arbitrary and capricious, even though this court may have reached the opposite conclusion.” *Id.*

Both parties agree that the applicable regulation to determine Mr. Riffel’s eligibility for COPES services is former WAC 388-72A-0055(4)(d), which provides as

follows:

You have a cognitive impairment and require supervision due to one or more of the following: Disorientation, memory impairment, impaired decision making, or wandering and have an unmet or partially met need with at least one or more of the following, as defined in [former] WAC 388-72A-0040 [(2003)]:

- (i) Extensive assistance plus one person physical assistance in toileting;
- (ii) Extensive assistance plus one person physical assistance in one of the following three tasks:
 - (A) Walk in room, hallway and rest of immediate living environment;
 - (B) Locomotion in room and immediate living environment;
 - (C) Locomotion outside of immediate living environment including outdoors.
- (iii) Extensive assistance plus one person physical assistance in transfer;
- (iv) Limited assistance plus one person physical assistance in bed mobility;
- (v) Physical help limited to transfer plus one person physical assist in bathing;
- (vi) Supervision plus one person physical assist in eating; or
- (vii) Daily assistance required in medication management.

According to Mr. Riffel's assessment, he was developmentally disabled, had short term memory deficits and impaired decision making, and needed supervision in bathing (although no setup or physical help), personal hygiene tasks (with one person physical assist), and eating (setup help only). On the other hand, he was independent with respect to bed mobility, transfers, toilet use, dressing himself, and locomotion. He was not on medication at the time of the assessment. The question before this court is whether the

supervision Mr. Riffel requires in bathing, personal hygiene, and eating is sufficient to qualify him for COPES services under the CARE assessment.

Former WAC 388-72A-0040(2)(a)(ii) provides that an individual is determined to need supervision to perform a task if he or she “[r]eceived oversight (monitoring or standby), encouragement, or cueing three or more times, or needed physical assistance in addition to supervision only once or twice” within the last seven days. The level of support needed from others within the last seven days is further categorized:

- (i) No set-up or physical help provided by others;
- (ii) Set-up help only provided, which is the type of help characterized by providing you with articles, devices, or preparation necessary for greater self-performance of the activity (such as giving or holding out an item that you take from others);
- (iii) One-person physical assist provided;
- (iv) Two- or more person physical assist provided; or
- (v) Activity did not occur during entire seven-day period.

Former WAC 388-72A-0040(2)(b).

According to Mr. Riffel’s care provider, Ms. Brown, he had to be reminded to take showers and to dress appropriately for the weather, but he needed no further assistance in those tasks. Although he was unable to cook food, he could feed himself and make simple meals like cereal and toast. Supervision of these tasks does not meet any of the definitions of “unmet or partially met” needs in former WAC 388-72A-0055(4)(d). Mr. Riffel simply did not need “[p]hysical help limited to transfer plus one person physical

assist in bathing.” Former WAC 388-72A-0055(4)(d)(v). And the reminders to eat properly and the assistance with cooking were categorized as setup help only, not as “[s]upervision plus one person physical assist in eating.” Former WAC 388-72A-0055(4)(d)(vi). Under the CARE assessment guidelines, these undisputed findings did not qualify Mr. Riffel for COPES services. He also failed to meet the more stringent eligibility requirements under former WAC 388-72A-0055 that apply to those who do not have a cognitive impairment. *See* former WAC 388-72A-0055(4)(a), (b), (c).

As explained by the administrative law judge, DSHS “amended its rules effective August 3, 2003, to discontinue payments to in-home care providers for shopping, housework, laundry, meal preparation, or wood supply services in situations where the provider lives with the person receiving the in-home care. This change is reflected in the CARE tool.” Clerk’s Papers (CP) at 13. *See* former WAC 388-71-0460(3) (2003). Mr. Riffel, although cognitively impaired, suffering from memory deficits and impaired decision making, and unable to shop for or prepare his own food, is not considered dependent enough under the new CARE assessment guidelines to qualify for benefits designed to aid him in living independently. The requirements in former WAC 388-72A-0055 are clear, and Mr. Riffel does not show that DSHS willfully or unreasonably misapplied those requirements to the undisputed facts. *Port of Seattle*, 151 Wn.2d at 589. Consequently, Mr. Riffel does not meet his burden of showing that DSHS’s order

terminating his COPES benefits was invalid. RCW 34.05.570(1)(a).

Admission of an Expert Evaluation

Mr. Riffel contends his assessment would have been different if he had been allowed to submit a September 2004 evaluation report by Dr. Domitor at the hearing before the DSHS board of appeals. A March 26, 2004 report by Dr. Domitor was admitted to the record at the administrative hearing. This report described Mr. Riffel's short-term memory and decision-making difficulties, but merely suggested that he had "neurocognitive impairment." BR at 85. In the September 2004 report, Dr. Domitor described additional examinations given to Mr. Riffel and diagnosed him with a cognitive disorder involving executive functioning and specific neurocognitive skills. The examination showed that Mr. Riffel had strength in language skills with low average intellectual functioning, but poor social judgment.

Generally the record is closed at the end of the administrative hearing unless the deadline is extended by the administrative law judge. WAC 388-02-0505. The parties may bring evidence to any prehearing meetings or to the hearing, and may even send in evidence after the hearing if given more time by the administrative law judge. WAC 388-02-0395; 388-02-0500(3). Only admitted evidence is considered to decide the case. WAC 388-02-0475(1). Once the record is closed, no more evidence may be taken "without good cause." WAC 388-02-0510. Determination of good cause is a

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discretionary act that will not be disturbed absent abuse of discretion. *See In re Disciplinary Proceeding Against Whitney*, 155 Wn.2d 451, 465, 120 P.3d 550 (2005).

As noted by Mr. Riffel, the regulations do not define “good cause.” However, the Administrative Procedure Act offers guidance in RCW 34.05.562(2)(b), which provides that a court may remand a matter to an agency for fact-finding if the court

finds that [(1)] new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and [(2)] the interests of justice would be served by remand to the agency.

Dr. Domitor’s September 2004 report was based on examinations made after the March 2004 report. The delay in making this “neuropsychological assessment” was due to the need to request authorization from the insurer. CP at 21. However, Mr. Riffel’s counsel knew that the report was pending, yet made no attempt on the record to obtain more time to submit this evidence. Further, the September 2004 report offers no new relevant evidence. DSHS acknowledged that Mr. Riffel has a cognitive disorder and poor decision-making skills. This disability is but one of the characteristics considered in determining eligibility for COPES benefits. Dr. Domitor’s September 2004 report does not add information regarding unmet needs relevant to the CARE assessment. Accordingly, it does not relate to the validity of the agency action. The board of appeals did not abuse its discretion in refusing to admit this evidence.

Equitable Estoppel

Finally, Mr. Riffel argues that DSHS should be equitably estopped from denying him COPES benefits after providing those benefits for six years. WAC 388-02-0495(1) provides that equitable estoppel may prevent DSHS from taking action against an individual. A party must show with clear and convincing evidence that (a) DSHS made a statement, took action, or failed to take action that was inconsistent with a later claim; (b) the party relied on DSHS's original statement or action or lack of action; (c) the party will be injured if DSHS is allowed to contradict the original statement, action, or lack of action; (d) equitable estoppel is necessary to prevent a manifest injustice; and (e) the exercise of government function will not be impaired. WAC 388-02-0495(2); *see also Kramarevsky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). "Equitable estoppel against the government is not favored." *Campbell v. Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 902, 83 P.3d 999 (2004). The doctrine does not apply here.

First, DSHS did not make a statement or take action that was inconsistent with a later claim. The parties agree that Mr. Riffel was eligible for COPES benefits for several years under the guidelines that were then in place. Eligibility is specifically limited by yearly reassessments to determine whether the recipient still needs services. Former WAC 388-71-0450; former WAC 388-72A-0005; former WAC 388-72A-0030. And the

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regulations state that DSHS has the right to terminate services if the eligibility requirements change. Former WAC 388-71-0455 (2000). DSHS never stated or acted as though Mr. Riffel's entitlement to COPES benefits was ongoing or guaranteed.

Second, for the reasons outlined above, Mr. Riffel could not justifiably rely on his prior assessments of eligibility. He offers no evidence that he was given any assurances of continued eligibility. Because he is presumed to know the law and the underlying facts, he has no basis for estoppel. *Campbell*, 150 Wn.2d at 903 (quoting *Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000)).

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Schultheis, J.

WE CONCUR:

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Sweeney, C.J.

Kato, J.